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No. 89-0054

In The

Supreme Court of the United States

October Term, 1989

BARBARA JACKSON,

Petitioner,

v.

HARVARD UNIVERSITY and JOHN McARTHUR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW*

Was the district court clearly erroneous in finding that petitioner's evidence was insufficient to prove sex discrimination in violation of Title VII of the Civil Rights Act of 1964?

STATEMENT REQUIRED BY RULE 29.1

* Respondent Harvard University, whose corporate name is President and Fellows of Harvard College, has no corporate parent, and no subsidiary other than wholly owned subsidiaries and HACO, Inc.

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STATEMENT OF THE CASE

In 1973, petitioner joined the faculty of respondent Harvard University as an Assistant Professor of Business Administration at the Graduate School of Business Administration ("Business School" or "School"). In 1977, she was promoted to Associate Professor and in 1981 she was considered for a tenured appointment as Professor of Business Administration. Pet. App. B-35 to B-36.

In the words of the court of appeals (Pet. App. A-2), "Tenure decisions at the Business School are subject to an exacting protocol. A subcommittee comprised of four faculty members measures the aspirant against the prescribed standards and presents an advisory report to the

tenured faculty as a whole. The full faculty conducts its own review of the candidate. Two votes are taken by signed ballot, some weeks apart. While these tallies are not binding *stricto senso,* the dean will generally not recommend tenure to Harvard's president and governing boards unless a candidate commands substantial majority support within the faculty. As a practical matter, a decision by the dean not to recommend tenure is final." See also Pet. App. B-36 to B-38.

Petitioner failed to command the support of a substantial majority of the faculty when it voted on her candidacy in 1981 (Pet. App. B-38 to B-48), and respondent McArthur, Dean of the Business School, took the somewhat unusual step of offering her a chance to remain at the School, working to improve her record and trying again at a later time. Pet. App. B-48 to B-50. Petitioner accepted this offer, prepared a scholarly monograph, and in 1983 asked to be considered again on the basis of her monograph. Pet. App. B-50 to B-55.

Petitioner fared no better in her 1983 review. Many reviewers inside and outside the School "noted that the monograph seemed incomplete, inadequate, and hastily written" (Pet. App. B-56) – characterizations that petitioner did not dispute at trial. Pet. App. B-58. She received only a slim majority of favorable votes from the tenured faculty, well short of the substantial majority necessary for the Dean to recommend tenure to Harvard's President and Governing Boards. Dean McArthur notified her that he could not recommend tenure, and she resigned shortly afterwards. Pet. App. B-60 to B-64. This action followed.

Petitioner filed a single-count complaint of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and, following extensive discovery, the district court conducted an eight-day trial. The court issued a lengthy memorandum of findings of fact and conclusions of law (Pet. App. B-1 to B-95) and entered judgment for respondents. Pet. App. B-95.

The district court found that the issue of discrimination was "extraordinarily clear" (Pet. App. B-5) because the evidence so overwhelmingly favored Harvard:[1]

> The evidence presented satisfies me that the judgment not to recommend [petitioner] for tenure was not infected by considerations of gender in any way. It was instead a determination on the merits as to which a large number of people of good will differed without reference to improper considerations. There was no direct evidence of discrimination presented; * * * [n]or does any of the circumstantial evidence adduced by [petitioner] provide an alternative basis for finding a discriminatory cause in the denial of tenure. Pet. App. B-2 to B-3.
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> * * *
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> On their face, nothing in these proceedings fairly suggests [petitioner] was discriminated against on the basis of her sex in the Business School's tenure decision. * * * I have analyzed these matters in great detail and find nothing beneath the surface which supports [petitioner's] position. Pet. App. B-5.

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[1] The district court pointed out that not a single witness came forward to support petitioner's claim that she was denied tenure because of her gender. See Pet. App. B-63.

* * *

> In summary, there is in this case no basis on which to find gender discrimination against the plaintiff in her tenure review. * * * There is here insufficient – indeed virtually no – evidence that illicit discriminatory motives were at work. Thus I * * * must enter judgment for the [respondents]. Pet. App. B-6.

The court of appeals affirmed. Pet. App. A-1 to A-12. It concluded that petitioner's "core claim reduces to the assertion that, had the facts been judged properly, she would have prevailed" (Pet. App. A-5), but that "a painstaking canvass of the record intimates no hint of clear error" that F.R.C.P. 52(a) requires if the lower court's findings are to be disturbed. Pet. App. A-8. The court of appeals held that the district court had "correctly understood and applied the substantive and procedural rules for probing sex discrimination in the context of academic tenure disputes." Pet. App. A-7. See Pet. App. B-6 to B-13.

ARGUMENT

The judgment below was correct, and petitioner raises no issue worthy of this Court's review. Here, as in the court of appeals, petitioner "has done no more than dress * * * factual disputes in rather ill-fitting 'legal' costumery." Pet. App. A-6.

1. Petitioner argues (Pet. 8-13) that the district court and the court of appeals misapplied the *McDonnell Douglas-Burdine* analysis (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981)) by requiring petitioner to

"go beyond proving the articulated reason [of the respondents] false * * * [and] to prove that there was no other possible reason for the [respondents'] action other than sex bias." Pet. 9. In petitioner's view, the lower courts did this by deeming evidence of sex stereotyping "not relevant" (Pet. 11) and by requiring petitioner to "disprove every benign explanation for the outcome of the faculty deliberations" (Pet. 13) that led to the denial of tenure.

This contention is without foundation. The district court did not find that sex stereotyping was irrelevant; indeed, it admitted petitioner's evidence of alleged stereotyping and considered it in detail (Pet. App. B-64 to B-79). The court simply concluded that all the circumstantial evidence – including that of alleged stereotyping – was nothing more than a "a collection of attenuated, dated, and immaterial incidents and stray remarks, *de minimus* procedural anomalies, and inapposite comparisons with other tenure candidates." Pet. App. B-5. The court of appeals found this appraisal of the evidence "utter[ly] plausib[le]." Pet. App. A-7.[2] There is no

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[2] Petitioner's factual claims are, in any event, groundless. She argues (Pet. 10) that there was "highly significant" evidence of sex stereotyping because petitioner's "personality" was allegedly discussed more extensively than in the case of male candidates. As the district court noted, such an assertion, if true, would be some evidence of sex discrimination under *Price Waterhouse v. Hopkins*, No. 87-1167, ___ U.S. ___, 109 S. Ct. 1775, 1790-91 (1989) (plurality opinion), but petitioner "has not produced any evidence in support of her contention." Pet. App. B-79. While one professor testified that the faculty engaged in "much more discussion of [petitioner's] personality than in the usual case," the district court, addressing that testimony (Pet. App. B-78 to B-79), found that, taken as a whole, it did not establish any "gender-biased disparate treatment in [petitioner's] review." Pet. App. B-79.

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warrant for this Court to review this wholly fact-bound question of the sufficiency of the evidence.[3]

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Similarly, petitioner notes (Pet. 10) that an outside reviewer in 1981 was asked whether his strongly favorable review of petitioner's work was influenced by "affirmative action." (He replied that it was not.) The district court weighed this evidence (Pet. App. B-76 to B-78) and found, under all the circumstances, that it was "only marginally significant as circumstantial evidence of gender bias." Pet. App. B-78 (footnote omitted).

Petitioner also argues (Pet. 16) that the district court erred in not attaching controlling weight to the fact that the School refused to remove from her subcommittee a professor she claimed was biased against women. The district court found that the professor, with whom petitioner had co-authored a book, might at most have been biased against petitioner, but not for reasons of gender, and that the refusal to remove him played, in any event, "a *de minimus* role" in the outcome of the tenure decision. See Pet. App. B-74 to B-76.

Petitioner claims (Pet. 9-10, 12-13) that the district court erroneously "dismissed" (Pet. 12) testimony of Senior Associate Dean Donaldson that the Business School is not "wholly immune" from the attitudes of "society at large" that tend to resist women in untraditional leadership roles. Again, the district court considered this testimony in detail (Pet. App. B-70 to B-73), noting Donaldson's unequivocal assertions that the tenure process at the Business School "is as free of discrimination as it can be" (Pet. App. B-72) and that to his knowledge no faculty member had ever opposed any female candidate for tenure on the basis of sex (*ibid.*). The court concluded that Dean Donaldson had established a "race and gender neutral process" for tenure decisions and found his testimony "wholly credible" (Pet. App. B-73).

Finally, petitioner's argument that she qualified for tenure in 1981 and was denied it because of her gender (Pet. 16-17) is contrary to the factual findings of the district court. See Pet. App. B-38 to B-48.

[3] Petitioner takes exception (Pet. 11-12) to the district court's comment that disparate treatment analysis cannot

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2. Petitioner next claims (Pet. 13-15) that the district court erroneously allowed respondents to "change their articulated reason [for the denial of tenure] after discovery was concluded." Pet. 14. Petitioner's argument is that, during discovery, respondents asserted that she had been denied tenure because her scholarly qualifications were lacking (Pet. 14), but that "just as the trial was about to begin" the district court "allow[ed]" respondents to assert something different: that tenure was denied because "a substantial number of the members of the [tenured faculty] determined that [petitioner's] scholarship did not meet" the School's standards. Pet. 17.

There are several answers to this assertion. First, the petitioner's bifurcation of the "articulated reason" for denial of tenure is quite artificial. Respondents' reason, articulated throughout the litigation from answer to trial,

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"police" individual "subconscious stereotypes and prejudices" (Pet. App. B-73). The court's observation merely recognizes that Title VII regulates what people do, not what they hold in their subconscious. As a plurality of this Court stated in *Price Waterhouse v. Hopkins, supra,* ___ U.S. at ___, 109 S. Ct. at 1790-91, an employer who "*acts on* the basis of" sex stereotypes "has *acted on* the basis of gender." (Emphasis added.) Here, the district court, mindful of *Price Waterhouse* (see Pet. App. B-69, B-79), found that no one at the Business School had acted on the basis of stereotypes.

In that regard, we note that the district court certainly did not say, as petitioner claims, that Title VII "could not reach discrimination which was *the product of* 'subconscious stereotypes and prejudices'." Pet. 11 (emphasis added); see also Pet. 12. Nor did it say that "if a University's bias against women is the product of general societal attitudes it is not illegal." Pet. 12. See Pet. App. B-73.

was that petitioner's scholarship was deficient, as determined by the full faculty and reflected in its vote. As the district court put it (Pet. App. B-44): " * * * Harvard has articulated as the non-discriminatory reason for denying tenure * * * plaintiff's alleged failure to demonstrate sufficient creativity;" thus petitioner "was denied tenure in 1983 because she had failed to convince a substantial majority of the tenured faculty that she possessed the level of creativity required for tenure at the Business School." Pet. App. B-62.

Second, any change in Harvard's articulated reason, if petitioner had shown one, would have been a matter for the district court to weigh in appraising the credibility of Harvard's witnesses; it would not implicate the applicability of Title VII to academic tenure decisions, as petitioner claims. Pet. 18.

Finally, petitioner's preoccupation with *Burdine*'s "basic allocation of burdens and order of presentation of proof," *Burdine, supra,* 450 U.S. at 252, overlooks the fundamental principle that in Title VII cases "the McDonnell-Burdine presumption 'drops from the case' " when, as here, the defendant offers its evidence of the reason for its decision (*U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715 (1983), quoting *Burdine, supra,* 450 U.S. at 255). The district court must "decide the ultimate factual issue in the case," which is whether the defendant intentionally discriminated against the plaintiff. *Aikens, supra,* 460 U.S. at 715. Thus, when deciding whether the defendant discriminated, neither the trial court nor reviewing courts should "treat discrimination differently from other ultimate questions of fact." *Id.* at

716. Petitioner's contention that Harvard changed its story in mid-stream, therefore, is merely an argument that the district court should not have found Harvard's witnesses as credible as it did.

3. Petitioner's final claim (Pet. 17 n. 11 and 18-20) appears to be that the decision below conflicts with this Court's decision in *University of Pennsylvania v. EEOC*, No. 88-493, ___ U.S. ___, 110 S. Ct. 571 (1990), which held that a university has no constitutional or common law privilege to withhold tenure records from the EEOC in discrimination investigations. While Harvard did redact names and identifying data in some tenure records that it produced to petitioner[4], any potential error in this regard was cured when the district court at trial offered to "reopen[] discovery and allow[] [petitioner] to make further inquiry unconstrained by the limitations of an academic privilege." Pet. App. B-27. Petitioner "rejected the offer and chose * * * not to pursue further discovery." Pet. App. B-28; see also Pet. App. A-9. Thus she is in no position to complain that she was precluded from any evidence on grounds of academic privilege.

There is no foundation whatever for petitioner's closing assertion (Pet. 20) that the court of appeals has endangered the application of Title VII to academic tenure decisions. Shortly before its decision in this case, the court of appeals held that a tenure candidate at another

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[4] Contrary to petitioner's assertion (Pet. 19), Harvard did not "shield from discovery the how and why of individual votes." Petitioner was free to ask any individual faculty member how he or she voted on petitioner's candidacy, and why, and she exercised this opportunity freely during discovery.

university had been the victim of sex discrimination in violation of Title VII, and it affirmed a judgment that she be reinstated with tenure. *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir.1989), cert. denied, June 18, 1990 (No. 89-1680).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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